Filed 12/17/15 P. v. Hodges CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BENNIE HODGES,

Defendant and Appellant.

F068297

(Super. Ct. No. BF146944A)

OPINION

APPEAL from orders of the Superior Court of Kern County. Michael G. Bush, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Bennie Hodges appeals from an order that found her incompetent to stand trial, committed her to Patton State Hospital, and directed the treatment facility to administer antipsychotic medication to her involuntarily. On appeal, Hodges contends: (1) the evidence was insufficient to support the trial court's finding of incompetence

because, inter alia, the evaluating psychologist applied an incorrect standard in evaluating her; (2) the evidence was insufficient to support the order for involuntary administration of antipsychotic medication; and (3) the court violated her federal constitutional rights in denying her repeated requests to address the court. We agree with Hodges that the order for involuntarily administration of antipsychotic medication is unsupported by substantial evidence but reject her other contentions. We therefore affirm the order finding Hodges incompetent to stand trial, vacate the order authorizing the involuntary administration of antipsychotic medication, and remand with directions.

STATEMENT OF THE CASE

On February 26, 2013, Hodges was charged with assault with a deadly weapon (boiling water) with a special allegation for personal infliction of great bodily injury (Pen. Code,[1] §§ 245, subd. (a)(1), 1192.7, subd. (c)(8); count 1) and battery resulting in serious bodily injury (§ 243, subd. (d); count 2). The charges reportedly stemmed from an incident in which 77-year-old Hodges threw boiling water on her brother.

On April 12, 2013, the court suspended criminal proceedings and appointed a mental health professional to evaluate Hodges and determine if she was competent to stand trial pursuant to section 1368.

On May 8, 2013, Nick Garcia, Ph.D., a licensed psychologist, submitted a report to the court regarding his evaluation of Hodges' competence to stand trial. Dr. Garcia summarized his findings as follows:

> "As a result of the current evaluation of the Defendant, I believe that the Defendant is **Not Competent to Stand Trial.** I believe that the Defendant will have difficulty offering reasonable assistance to her attorney in defending her. She appeared to have delusions that I believe would impair her ability to cooperate with her attorney. Specifically, the Defendant appeared to be suspicious and guarded with regards to the role of her attorney. She appears to feel that all attorneys, whether defense or

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1 Further statutory references are to the Penal Code unless otherwise specified.

prosecutors, are 'in it together.' She believes they all belong to the same organization, and she believes this organization is following her and causing her a significant amount of harm. She believes that people 'live underground.' The Defendant opined that the legal system is part of this 'underground group.' The Defendant did not express any major difficulties with regards to having a factual understanding of her case and demonstrated some difficulties with regards to having a rational understanding of her case. She understands the charges that are against her.

"Based on a reasonable degree of psychological certainty, I believe the Defendant has a scattered, non-reality based appraisal of her circumstances as a result of her delusions of persecution and paranoid features. She does not appear capable, at this time, of rudimentary decision making, and I believe that she would have difficulty considering different alternatives with regards to her case. I believe the Defendant would have difficulty consulting with her attorney. It is my opinion that the Defendant would have difficulty making a competent decision with regards to making a plea because of the delusions of persecution and paranoid behavior that she currently possesses."

On May 13, 2013, the court found Hodges incompetent to stand trial and referred her to the Kern County Mental Health Department for a recommendation and evaluation regarding placement.

On August 23, 2013, after Hodges failed to report to the Kern County Mental Health Department for evaluation, the court again referred her to report to the department for an evaluation regarding both placement and whether treatment with psychiatric medication was medically appropriate and likely to restore her to mental competence.

On September 19, 2013, the court remanded Hodges to custody based on her continuing failure and refusal to report to the Kern County Mental Health Department for evaluation.

On October 10, 2013, Robert Sincoff, M.D., a licensed psychiatrist, submitted his recommendation regarding the treatment of Hodges with involuntary treatment with medication. Dr. Sincoff concluded:

"The treatment of Bennie Hodges with involuntary psychotropic medications is medically appropriate. Her diagnosis at this time is

psychosis NOS. She will need medication to stabilize symptoms such as delusions. At this point in time, the specific medication prescribed is: none as the patient refuses psychotropic medications. There is a substantial likelihood that this client will be restored to competency if medicated. There is a substantial likelihood that restoration to competency cannot be achieved without such treatment. The past efficacy of this medication is not known or has been inconsistent, but given the diagnosis and clinical presentation, treatment with this medication is medically indicated. There are no medically indicated alternative treatments to address the mental health condition of this individual.

"The types of medications that would be most appropriate are anti-psychotic medications. The likely or potential side effects of these medications which are often noticed are: Drowsiness, dry mouth, constipation, blurry vision, difficulty urinating, muscle stiffness, slowed movements, tremor, restlessness, dizziness, weight gain, menstrual abnormalities, problems with sexual functioning, and abnormal involuntary movements. These side effects are unlikely to significantly interfere with the client's ability to assist in his defense at trial."

On October 17, 2013, the trial court committed Hodges to Patton State Hospital for treatment and ordered the involuntary administration of antipsychotic medication as prescribed by the treating psychiatrist. This appeal followed.

DISCUSSION

I. The finding of Hodges's incompetency to stand trial.

In her first contention on appeal, Hodge claims the trial court's finding she is incompetent to stand trial is unsupported by substantial evidence. In a related but separately raised contention, Hodge claims Dr. Garcia applied an incorrect standard in evaluating her competency to stand trial. We reject both claims.

"Under California law, a person is incompetent to stand trial 'if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).)" (*People v. Young* (2005) 34 Cal.4th 1149, 1216; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1063; *People v. Garcia* (2008) 159 Cal.App.4th 163, 170 (*Garcia*).) Our high court has recited the similar federal standard

of incompetence as follows: "A defendant is incompetent to stand trial if he or she lacks a '"sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and ... a rational as well as a factual understanding of the proceedings against him."' (*Dusky v. United States* (196[0]) 362 U.S. 402 [(*Dusky*)]; see also *Godinez v. Moran* (1993) 509 U.S. 389, 399–400; § 1367; *People v. Stewart* (2004) 33 Cal.4th 425, 513.)" (*People v. Rogers* (2006) 39 Cal.4th 826, 846–847; see also *People v. Lewis* (2008) 43 Cal.4th 415, 524; *People v. Halvorsen* (2007) 42 Cal.4th 379, 401.)

On appeal, a finding on the issue of a defendant's competence to stand trial "cannot be disturbed if there is any substantial and credible evidence in the record to support the finding." (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1418 (*Castro*), disapproved on other grounds in *People v. Leonard* (2007) 40 Cal.4th 1370, 1391, fn. 3.; see also *Garcia, supra*, 159 Cal.App.4th at p. 171.) We view the evidence in the light most favorable to the verdict to determine if it supports the trial court's finding. (*People v. Marshall* (1997) 15 Cal.4th 1, 31.) "'Evidence is substantial if it is reasonable, credible and of solid value.'" (*People v. Lawley* (2002) 27 Cal.4th 102, 131.) "'In addition, a reviewing court generally gives great deference to a trial court's decision'" on the defendant's competence to stand trial. (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 382–383 (*Kaplan*), quoting *People v. Marshall, supra*, at p. 33.)

"In determining whether there is substantial evidence of incompetence, a court must consider all of the relevant circumstances, including counsel's opinion. (*People v. Howard* (1992) 1 Cal.4th 1132, 1164.) '[T]he "inexactness and uncertainty" that characterize competency proceedings may make it difficult to determine whether a defendant is incompetent or malingering.' (*Cooper v. Oklahoma* [(1996)] 517 U.S. [348,] 365[.]) Thus, 'what constitutes ... substantial evidence in a proceeding under section 1368 "cannot be answered by a simple formula applicable to all situations." [Citation.]' (*People v. Laudermilk* (1967) 67 Cal.2d 272, 283.) '"[S]ufficient present

ability"' to cooperate with a lawyer and assist rationally in preparing a defense includes more than an 'orientation as to time and place,' and 'some recollection of events is not enough.'" (*Castro, supra,* 78 Cal.App.4th at p. 1415.) While substantial evidence of incompetence may be established by the opinion of an expert, "it is not required." (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1024.) "'Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations.' (*People v. Rogers, supra,* 39 Cal.4th at p. 847.) 'More is required than just bizarre actions or statements by the defendant to raise a doubt of competency.'" (*Kaplan, supra,* 149 Cal.App.4th at p. 383.)

Here, Dr. Garcia's opinion that Hodges was incompetent to stand trial centered on his negative assessment of her ability to assist counsel in the conduct of her defense. As an initial matter, therefore, we address Hodges's claim that Dr. Garcia applied an incorrect standard in making this assessment. According to Hodges, Dr. Garcia failed in his competency evaluation to assess "'whether [she] has sufficient *present* ability to consult with [her] lawyer with a *reasonable degree of rational understanding*.'" (*Dusky, supra,* 362 U.S. at p. 402, italics added.) To support her claim that Dr. Garcia did not assess her competency under the *Dusky* standard, Hodges relies on statements in his report, expressing the opinion that she "*would* have difficulty offering *reasonable assistance* to her attorney in defending her." (Italics added.)

Contrary to Hodges's suggestion, departures or variations in the language employed by Dr. Garcia to express his opinion from the language employed by the Supreme Court in *Dusky* fail to demonstrate that he did not apply the federal standard in his competency evaluation. Indeed, his report supports the opposite conclusion. Dr. Garcia reported utilizing several different testing procedures to evaluate Hodges's competency, including the "Evaluation of Competency to Stand Trial-Revised (ECST-R)," which he described as "a semi-structured interview *designed to assess* psychological domains relevant to the legal standard for *competency to stand trial as propounded in*

[*Dusky*])." (Italics added.) He further reported that the benefits of the ECST-R were that it was "*congruent with the Dusky standard*, established construct validity, admissibility under the Daubert standard and systematic screening for feign and competency." (Italics added.) After Dr. Garcia administered the ECST-R test, Hodges "obtained a T-Score of 78 on the Consult With Counsel Scale," which indicated she "demonstrated *Severe difficulties* in her ability to consult with counsel." (Italics added.)

Dr. Garcia's unequivocal opinion that Hodges was incompetent to stand trial provided substantial evidence to support the trial court's finding of incompetence. Hodges's argument that Dr. Garcia's opinion was "undermined by his own evaluation summary" is unpersuasive. Although Hodges reportedly made some positive comments about counsel, none of the comments she cites contradicted or undermined any of Dr. Garcia's opinions regarding her competency.

We are also unpersuaded by Hodges's suggestion that her reported statements expressing distrust in her attorney and the belief that attorneys are all "in it together" were analogous to popular expressions of discontent with the legal system and were improperly cited by Dr. Garcia as evidence of paranoia or delusion. Dr. Garcia's report did not indicate that such statements mirrored popular sentiment regarding the legal system but instead demonstrated they emanated from pervasive delusions of paranoia and persecution, which, in Dr. Garcia's words, reflected her "non-reality based appraisal of her circumstances." Hodges did not simply express the belief that all attorneys "belong to the same organization." She also expressed the belief that the "organization" was "following her" and that the legal system was part of a group of people who "live underground."

In reporting these and other delusional beliefs expressed by Hodges during her evaluation, Dr. Garcia observed that Hodges had difficulty "answering questions without inserting her delusions and demonstrated a significant amount of paranoid behavior as well as guardedness during the course of the evaluation." Although, at times, Hodges

appeared "connected," at other times, she "perseverated on themes of the government spying on her, injecting her and physically mistreating her." Dr. Garcia's conclusions that Hodges "would have difficulties being able to cooperate and strategize with her attorney" and "difficulty being able to rationally consult with her attorney" were well substantiated in his report. The trial court's finding of incompetence is supported by substantial evidence.

II. The authorization for involuntary medication of Hodges.

Hodges contends the trial court's order granting the treatment facility authority to administer antipsychotic medication to her involuntarily is not supported by substantial evidence and must be reversed. This contention has merit.

The United States Supreme Court recognizes an individual has a constitutionally protected liberty interest guaranteed under the due process clause to refuse administration of antipsychotic medication unless he or she is a danger to himself or herself, or to others, and the treatment is in his or her medical interest. (*Washington v. Harper* (1990) 494 U.S. 210, 221; *Carter v. Superior Court* (2006) 141 Cal.App.4th 992, 999 (*Carter*).) The government can involuntarily medicate a mentally ill criminal defendant in order to render him or her competent to stand trial only if four factors are present. First, important governmental interests must be at stake. Thus, bringing an accused to trial is important but courts must consider the individual case. A defendant's failure to take medications voluntarily may mean a lengthy confinement in an institution for the mentally ill. The government must weigh the need for a timely and fair trial against the possibility that the defendant has already been confined for a significant amount of time. (*Sell v. United States* (2003) 539 U.S. 166, 180 (*Sell*).)

Second, the court must conclude that involuntary medication will significantly further the concomitant state interests of timely prosecution and a fair trial. The court must find that administration of drugs is substantially likely to render the defendant to stand trial and must find use of medication is substantially unlikely to have side effects

that will interfere with the defendant's ability to assist counsel in conducting a defense. (*Sell*, *supra*, 539 U.S. at p. 181.) Third, the court must conclude involuntary medication is necessary to further those interests. The court must find that alternative, less intrusive treatments are unlikely to achieve the same results. And the court must consider less intrusive means for administering drugs. (*Ibid.*)

Fourth, the court must conclude administration of the drugs is medically appropriate, i.e., in the patient's best interest in light of his or her medical condition. "The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." (*Sell*, *supra*, 539 U.S. at p. 181.) These constitutional requirements have been codified by our Legislature into the Penal Code. (§ 1370, subd. (a)(2)(B)(ii); see *People v. O'Dell* (2005) 126 Cal.App.4th 562, 569 (*O'Dell*).)

Although the trial court arguably made the statutory findings necessary for an involuntary medication order, Dr. Sincoff's half-page medication recommendation is too generic to constitute substantial evidence to support those findings. Among other failings, he did not identify a specific medication that would likely be used to treat Hodges, and he listed the side effects for antipsychotic medication in general. The evidence did not meet the constitutional standard set forth in *Sell*. The court is obligated to consider specific drugs as well as their unique side effects. (*Carter*, *supra*, 141 Cal.App.4th at p. 1004; *U.S. v. Rivera-Guerrero* (9th Cir. 2005) 426 F.3d 1130, 1137–1138.)

We recognize that these requirements place a unique and heavy burden on trial courts. There are few, if any, judges who are trained psychiatrists. To assist the court in its constitutional duties, evaluating physicians need to be as specific as possible concerning the defendant's diagnosis. The doctors must discuss the benefits and disadvantages of the particular medication or medications that may be administered, including side effects to the defendant's physical and mental health and the defendant's

ability to assist counsel at trial. (*Carter*, *supra*, 141 Cal.App.4th at pp. 1004–1005; *O'Dell*, *supra*, 126 Cal.App.4th at pp. 570–571.) Courts further need information concerning the proper dosage level or range to properly evaluate the effectiveness of the medication or medications to be administered.

III. The propriety of the trial court's refusal to allow Hodges to address the court.

During a number of the hearings in this case, Hodges interrupted by injecting generalized comments protesting that her civil rights were being violated, she did not have a mental illness, and she would not take medication because she was not ill. Hodges now contends that, by refusing to indulge these interruptions and provide her with further opportunity to address the court, the trial court denied her an opportunity to be heard in violation of her rights under the Sixth and Fourteenth Amendments of the Unites States Constitution. We conclude that Hodges has failed to demonstrate a violation of her constitutional rights occurred.

Hodges's claim rests on the premise that her comments to the trial court essentially amounted to a request for substitution of counsel. She thus suggests the trial court violated her constitutional rights by failing to conduct a *Marsden*[2] hearing to allow her the opportunity to argue and present evidence to support her belief that counsel was providing her with inadequate representation as well as her belief that she was competent to stand trial.

After careful review of Hodges's individual comments and the record as a whole, we find no support for the premise underlying her claim or reason to conclude the trial court should have understood her comments to be directed at counsel's performance. Subsequent allegations of inadequate representation by Hodges in her notice of appeal and request for certificate of probable cause, in which she complained that counsel failed to investigate certain evidence and seemed more interested in sending her to a mental

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2 *People v. Marsden* (1970) 2 Cal.3d 118, 123.

institution than in defending her, do not demonstrate that she communicated such complaints to the trial court at the time of the comments at issue or that the court violated her constitutional rights by failing to hold a *Marsden* hearing.

DISPOSITION

With reference to the trial court's order finding Hodges incompetent to stand trial, the order is affirmed.

With reference to the trial court's order authorizing involuntary administration of antipsychotic medication, the court is ordered to (1) vacate its order, (2) conduct a new hearing on that issue, if and only if appropriate to the then-current status of the case, at which hearing the parties shall be permitted to introduce additional evidence, and (3) determine whether, under the criteria in *Sell v. United States* (2003) 539 U.S. 166 and Penal Code section 1370, antipsychotic medication should be involuntarily administered to Hodges.

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HILL, P.J.

WE CONCUR:

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LEVY, J.

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PEÑA, J.